CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32502/96
by Hubert RUSCHAK
against Austria

The European Court of Human Rights (Third Section), sitting on 21 March 2000 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr K. Traja,
Mr M. Ugrekhelidze, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 15 July 1996 and registered on 5 August 1996,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1972. He lives in Linz and is represented before the Court by Mr. G. Tews, a lawyer practising in Linz.

A. Particular circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 25 May 1995 the applicant caused a road traffic accident in which one person was killed and another person was injured.

On 23 August 1995 he was found by the Linz Police Authority (*Bundespolizeidirektion*) to have been driving under the influence of drink, contrary to section 5 of the Road Traffic Act 1960 (*Straßenverkehrsordnung*). He confessed and did not appeal.

On 25 August 1995 the Traun police submitted a report to the Linz prosecuting authority, following which on 29 September 1995 an information was laid against the applicant under Articles 81 and 88 §§ 1 and 3 of the Criminal Code (*Strafgesetzbuch*). The applicant was accused, *inter alia,* of causing death by negligence "after allowing himself ... to become intoxicated ... through the consumption of alcohol, but not to an extent which exclude[d] his responsibility ...", contrary to Article 81 § 2 of the Criminal Code.

At the hearing before the Linz Regional Court (*Landesgericht*) on 10 November 1995, the applicant claimed that, as he had already been sentenced in the administrative criminal proceedings, the reference to becoming “intoxicated” should not be repeated in the criminal proceedings. The Regional Court noted that the administrative criminal proceedings had considered the applicant’s driving whilst under the influence of drink, and not the issue of the road traffic accident. The applicant was convicted on the same day and sentenced under Articles 88 §§ 1 and 3 and 81 § 2 of the Criminal Code to seven months' imprisonment.

The applicant appealed, claiming *inter alia*, that his conviction violated Article 4 of Protocol No. 7 to the Convention. He referred to the Gradinger case, which at that date was pending before the Court (the Gradinger v. Austria judgment of 23 October 1995, Series A no. 328-C).

The Linz Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal on 8 July 1996. It considered that the judgment in the Gradinger case had an impact on the constitutionality of an administrative provision (Section 99 § 6c of the Road Traffic Act) rather than on the constitutionality of the proceedings under criminal law.

B. Relevant domestic law and practice

1. The Road Traffic Act

Section 5 of the Road Traffic Act 1960 provides that it is an offence for a person to drive a vehicle if the proportion of alcohol in his blood or breath is equal to or higher than 0.8 grams per litre or 0.4 milligrams per litre respectively.

Section 99 of the 1960 Act provides, so far as relevant, that:

> "(1) It shall be an administrative offence (*Verwaltungsübertretung*), punishable with a fine of not less than ATS 8,000 and not more than ATS 50,000 or, in default of payment with one to six weeks' imprisonment, for any person:
> (a) to drive a vehicle when under the influence of drink ...
>
> (6) An administrative offence is not committed where: ...
> (c) facts constituting an offence under sub-sections (2), (3) or (4) also constitute an offence falling within the jurisdiction of the [ordinary] courts ... ."

2. The Criminal Code

Under Article 80 of the Criminal Code, it is an offence, punishable by up to one year's imprisonment, to cause death by negligence. Where the special circumstances of Article 81 § 2 apply, the maximum possible sentence is increased to up to three years' imprisonment.

Article 81 § 2 applies where a person commits the offence

> "after allowing himself, even if only negligently, to become intoxicated ... through the consumption of alcohol, but not to an extent which excludes ... responsibility ...".

By virtue of an irrebuttable presumption applied by the criminal courts, a driver with a blood alcohol level of 0.8 grams per litre or higher is deemed to be "intoxicated" for the purposes of Article 81 § 2.

Under Article 88 § 1 of the Criminal Code, it is an offence, punishable by up to three months' imprisonment or a fine, to cause physical injury by negligence.

Article 88 § 3 increases the sentence in respect of causing injury where the special circumstances of Article 81 § 2 apply, to up to six months' imprisonment or a fine.

COMPLAINTS

The applicant alleges violations of Article 4 of Protocol No. 7 to the Convention and of Article 13 of the Convention.

THE LAW

The applicant alleges a violation of Article 4 of Protocol No. 7 to the Convention by virtue of the criminal proceedings which followed the administrative criminal proceedings in the case. Article 4 of Protocol No. 7 provides, so far as relevant, as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The applicant also alleges a violation of Article 13 of the Convention, which guarantees effective domestic remedies for breaches of the Convention or its Protocols.

1. The Government submit that the applicant has not exhausted domestic remedies as required by Article 35 of the Convention, in that he failed to appeal against the conviction for the breach of section 5 of the Road Traffic Act 1960. In particular, they point out that, in a decision of 5 December 1996 (G9/96), the Constitutional Court found that the exclusion of cases such as the present from the principle of "subsidiarity" in section 99 § 6c was unconstitutional. The "subsidiarity" principle thereafter applied also to section 99 § 1. Until that date, section 99 § 6c had provided that certain administrative offences were not committed if the facts also fell within the jurisdiction of the ordinary courts, but the exception did not extend to cases such as the present.

The applicant states that Article 4 of Protocol No. 7 prohibits criminal proceedings being conducted for a second time, and does not require "subsidiarity" between criminal and administrative offences. He contends that he cannot be required to appeal against a conviction in order to give the State the possibility of conducting proceedings against him which could give rise to a much heavier sentence, and adds that the administrative criminal proceedings could not themselves have infringed Article 4 of Protocol No. 7 because they were the first set of proceedings.

The Court recalls that Article 35 of the Convention requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. The burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (see generally in connection with the exhaustion of domestic remedies, the Akdivar and others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, §§ 65-69).

In the present case, the Court notes, as the applicant points out, that the administrative criminal proceedings preceded the criminal proceedings. When the applicant was fined on 23 August 1995, there was therefore no reason for him to be aware that criminal proceedings would follow. As the applicant was present on that occasion, the two week period for appealing expired well before the prosecution against him began before the ordinary criminal courts. The applicant was therefore not formally aware that criminal proceedings would be brought, such that, even if a constitutional complaint were an effective remedy as regards Article 4 of Protocol No. 7, the applicant would not have been aware of the need to pursue it.

In any event, the Court does not accept that an appeal and subsequent constitutional complaint could have constituted an effective remedy in the present case, concerned as it is with the right not to be "tried or punished again in criminal proceedings ... for an offence for which [a person] has already been finally acquitted or convicted ...". In particular, if the applicant had been successful before the Constitutional Court, the most advantageous outcome would have been the quashing of the administrative proceedings. Whilst from a domestic perspective it may be the case that nothing would then have stood in the path of criminal proceedings, the Court considers that the applicant would nevertheless have been in the position of a person "finally acquitted" of the administrative offence. Further criminal proceedings would have given rise to the same problems under the provision as if the applicant had not pursued a constitutional complaint.

It follows that the application cannot be rejected for non-exhaustion of domestic remedies.

2. As to the merits, the Government submit that the Court, in its Oliveira v. Switzerland judgment (30 July 1998, *Reports of Judgments and Decisions* 1998-V), had – contrary to its Gradinger v Austria judgment (23 October 1995, Series A no. 328-C) – considered the legal qualification as the criterion for determining the "offence" within the meaning of Article 4 of Protocol No. 7. The Government, while conceding that there are certain differences, argue that the present case is comparable to the Oliveira case. In their view, the present application, like the Oliveira case, concerns "a typical example of a single act constituting various offences (*concours idéal d'infractions*)", i.e. a case where one criminal act constitutes two separate offences which does not infringe Article 4 of Protocol No. 7. Besides, unlike the Gradinger case, there was no inconsistency in the two relevant authorities' assessment of the present applicant's blood alcohol level.

The applicant contests the Government's view. He submits that the Oliveira case is not comparable to his, as the Austrian criminal courts and prosecuting authorities did not take into account that he had already been tried and punished by the Linz Police Authority.

The Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

S. Dollé
Registrar

N. Bratza
President